

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicant: Klassen, Lamberta A. M.

Examiner: Karls, Shay Lynn

Serial No.: 10/805,304

Art Unit: 3723

Filed: 3/22/2004

Docket No.: ROBI.4189-NY

Title: **CHILDREN'S TOOTH AND GUM CLEANING KIT**

Commissioner for Patents
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REPLY BRIEF OF APPELLANT

This Reply Brief addresses issues in the Examiner's Answer mailed March 27, 2008.

GROUND OF REJECTION 1

Claims 1-6, 12, 16, 28, and 31-32 stand rejected as being allegedly unpatentable under 35 U.S.C. 103(a) over Fischer (USPN 6,905,335) in view of Boland et al. (USPN 6,253,404) in view of Carr (USPN 5,765,252) and further in view of Blaustein et al. (USPN 6,836,917).

Appellant would like to direct the Board's attention to the Examiner's improper modification of the secondary reference to Boland et al. '404. In the Examiner's Answer, the Examiner modifies Fischer '335 with Boland et al. '404 and Carr '252. Then, the Examiner modifies Boland on page 5, lines 12-18. This rejection is improper because if one were able to modify secondary and tertiary references *ad nauseum*, one could always arrive at a claimed invention.

Further, this rejection (specifically page 5, lines 12-18) is improper because the Examiner has not provided actual proof in a prior art reference that modification of the shape of Boland et al. '404 would be obviated as to being oblong, or elliptical or oval. This conclusory statement is not supported by substantial evidence. In appellant's view this is a matter that must be backed by evidence or the rejection withdrawn. MPEP 2144.03 states:

It is never appropriate to rely solely on "common knowledge" in the art without evidentiary support in the record, as the principal evidence upon which a rejection was based. *Zurko*, 258 F.3d at 1385, 59 USPQ2d at 1697 ("[T]he Board cannot simply reach conclusions based on its own understanding or experience-or on its assessment of what would be basic knowledge or common sense. Rather, the Board must point to some concrete evidence in the record in support of these findings."). While the court explained that, "as an administrative tribunal the Board clearly has expertise in the subject matter over which it exercises

jurisdiction," it made clear that such "expertise may provide sufficient support for conclusions [only] as to peripheral issues." *Id.* at 1385-86, 59 USPQ2d at 1697.

As the court held in *Zurko*, an assessment of basic knowledge and common sense that is not based on any evidence in the record lacks substantial evidence support. *Id.* at 1385, 59 USPQ2d at 1697.

In addition, the Examiner argues that it would have been obvious to interchange the tools from Fischer's kit with the tools in Boland and Carr (page 5). However, Claim 1 is NOT obvious because the Boland patent does not teach the use of "flexible, omni-directional cleaning-tips made of a flexible material dimensioned and configured for use within a vestibule of children aged 1-4 years old", and the Carr patent does not teach a finger mounted device configured for toddler, but dimensioned to be worn by an adult. Appellant argues that dimensioned and configured for use within a vestibule of children aged 1-4 years old imparts structural limitations into the claims. Thus, Fischer teaches away from a children's cleaning or training kit, and is to be used by dental hygienists and technicians (abstract) that are usually not 1-4 years of age. The Examiner's Answer incorrectly compares the claimed invention to a simple substitution of known elements. It is not a simple substitution. Clearly, the Appellant did not simply substitute the tools taught in Boland and Carr because they are inapplicable and/or unsafe for children's use. Because Claim 1 is not obvious in light of Boland and Carr, the combination of those prior art references to Fischer would be negligible, and lead to a conclusion of non-obviousness.

Appellant respectfully asserts, based on the arguments provided *supra*, that claims 2-6, 12, 16, 28, and 31-32 are non-obvious. Accordingly, Appellant respectfully contends that the obviousness rejection of claims 2-6, 12, 16, 28, and 31-32 are improper and should be

overturned.

GROUND OF REJECTION 2

Claims 1-6, 12, 16, 28, 31-32, 34-35 stand rejected under 35 U.S.C. 103(a) as allegedly being unpatentable over Fischer (U.S. Patent No. 6905335) in view of Robertelli (U.S. Patent No. 3987549) in view of Carr (U.S. Patent No. 5765252) and further in view of Blaustein et al. (U.S. Patent No. 6836917).

Appellant would like to direct the Board's attention to the Examiner's improper modification of the secondary reference to Carr '252. In the Examiner's Answer, the Examiner modifies Fischer '335 with Carr '252. Then, the Examiner modifies Carr '252 with Blaustein '917 on the paragraph bridging pages 7 and 8. This rejection is improper because if one were able to modify secondary and tertiary references *ad nauseum*, one could always arrive at a claimed invention.

The Examiner's Answer asserts that it would have been obvious to a person having ordinary skill in the art to use an oblong shaped cleaning tip because Appellant has not disclosed that an oblong shaped cleaning tip provides a distinct advantage, is used for a particular purpose, or solves a stated problem (page 7). Appellant respectfully points out that the instant specification expressly states the advantages and the purpose of using an oblong shaped tip for the cleaning device. The specification reads,

"an oblong shape 21 when viewed from the bottom as seen in FIG. 5 to allow easy insertion into the infant or child's mouth and to achieve effective cleaning of the surface of the tongue and the roof of the mouth as well as the inside of the cheeks (which is called the "vestibule") with a 90 degree twist of the finger or the handle. The tips are also generally tapered 22 toward the top end to increase the comfort and ease of inserting the tip into the infant or child's mouth." [0091]

Furthermore, the Examiner's Answer argues that a person having ordinary skill in the art would expect a circular cleaning tip to perform as well as an oblong shape cleaning tip while cleaning teeth. In response, the oblong shape cleaning tip claimed in the invention performs well when cleaning the surface of the tongue and the roof of the mouth as well as the inside of the cheeks ("vestibule") of children, in addition to performing well cleaning teeth. Therefore, the cleaning tip in Claim 1 is NOT obvious in view of the cleaning tip of Robertelli.

In addition, Appellant respectfully contends that because it is not obvious to modify the cleaning tip of Robertelli, then combining that reference with Fischer does not render Claim 1 obvious. Appellant respectfully asserts, based on the arguments provided *supra*, that claims 2-6, 12, 16, 28, 31-32, and 34-35 are non-obvious. Accordingly, Appellant respectfully contends that the obviousness rejection of claims 2-6, 12, 16, 28, 31-32, and 34-35 are improper and should be overturned.

GROUND OF REJECTION 3

Claims 7-10 and 33 stand rejected under 35 U.S.C. 103(a) as allegedly being unpatentable over Fischer, Boland, Carr and Blaustein as applied to claim 1 above and further in view of Diamant (USPN 4406032) or Fischer, Robertelli, Carr and Blaustein as applied to claim 1 above and further in view of Diamant (USPN 4406032).

Appellant further draws the Board's attention to the Examiner's modification of the secondary and tertiary references using Diamant. If an independent claim, such as Claim 1, is non-obvious under 35 U.S.C. 103, then any claim depending therefrom is also non-obvious. *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988). Appellant respectfully asserts,

based on the arguments provided *supra*, that claims 7-10 and 33 are non-obvious.

Accordingly, Appellant respectfully contends that the obviousness rejection of claims 7-10 and 33 are improper and should be overturned.

GROUND OF REJECTION 4

Claims 13 and 23 stand rejected under 35 U.S.C. 103(a) as allegedly being unpatentable over Fischer, Boland, Carr and Blaustein as applied to claim 1 above and further in view of Aoyama (USPN 6612770) or Fischer, Robertelli, Carr and Blaustein as applied to claim 1 above and further in view of Aoyama (USPN 6612770).

Appellant further draws the Board's attention to the Examiner's modification of the secondary and tertiary references using Aoyama. If an independent claim, such as Claim 1, is non-obvious under 35 U.S.C. 103, then any claim depending therefrom is also non-obvious. *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988). Appellant respectfully asserts, based on the arguments provided *supra*, that claims 13 and 23 are non-obvious. Accordingly, Appellant respectfully contends that the obviousness rejection of claims 13 and 23 are improper and should be overturned.

GROUND OF REJECTION 5

Claims 21-22 and 27 stand rejected under 35 U.S.C. 103(a) as allegedly being unpatentable over Fischer, Boland, Carr and Blaustein as applied to claim 1 above and further in view of Trenz et al. (USPN 6745427) or Fischer, Robertelli, Carr and Blaustein as applied to claim 1 above and further in view of Trenz et al. (USPN 6745427).

Appellant further draws the Board's attention to the Examiner's modification of the secondary and tertiary references using Trenz et al. If an independent claim, such as Claim 10/805,304

I, is non-obvious under 35 U.S.C. 103, then any claim depending therefrom is also non-obvious. *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988). Appellant respectfully asserts, based on the arguments provided *supra*, that claims 21-22 and 27 are non-obvious. Accordingly, Appellant respectfully contends that the obviousness rejections of claims 21-22 and 27 are improper and should be overturned.

GROUND OF REJECTION 6

Claim 24 stands rejected under 35 U.S.C. 103(a) as allegedly being unpatentable over Fischer, Boland, Carr and Blaustein as applied to claim 1 above and further in view of Tortorice (USPN 6000410) or Fischer, Robertelli, Carr and Blaustein as applied to claim 1 above and further in view of Tortorice (USPN 6000410).

Appellant further draws the Board's attention to the Examiner's modification of the secondary and tertiary references using Tortorice. If an independent claim, such as Claim 1, is non-obvious under 35 U.S.C. 103, then any claim depending therefrom is also non-obvious. *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988). Appellant respectfully asserts, based on the arguments provided *supra*, that claim 24 is non-obvious. Accordingly, Appellant respectfully contends that the obviousness rejection of claim 24 is improper and should be overturned.

GROUND OF REJECTION 7

Claims 25-26 stand rejected under 35 U.S.C. 103(a) as allegedly being unpatentable over Fischer, Boland, Carr and Blaustein as applied to claim 1 above and further in view of Tortorice (USPN 6000410) and Silberman (USPN 2004/0161289) or Fischer, Robertelli, Carr and Blaustein as applied to claim 1 above and further in view of Tortorice (USPN 6000410) and Silberman (USPN 10/805,304

Appellant further draws the Board's attention to the Examiner's modification of the secondary and tertiary references using Tortorice and Silberman. If an independent claim, such as Claim 1, is non-obvious under 35 U.S.C. 103, then any claim depending therefrom is also non-obvious. *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988). Appellant respectfully asserts, based on the arguments provided *supra*, that claims 25-26 are non-obvious. Accordingly, Appellant respectfully contends that the obviousness rejections of claims 25-26 are improper and should be overturned.

GROUND'S OF REJECTION 8

Claim 30 stands rejected under 35 U.S.C. 103(a) as allegedly being unpatentable over Fischer, Boland, Carr and Blaustein as applied to claim 29 above and further in view of Drulias et al. (USPN 5392482) or Fischer, Robertelli, Carr and Blaustein as applied to claim 1 above and further in view of Drulias et al. (USPN 5392482).

Appellant further draws the Board's attention to the Examiner's modification of the secondary and tertiary references using Drulias. If an independent claim, such as Claim 1, is non-obvious under 35 U.S.C. 103, then any claim depending therefrom is also non-obvious. *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988). Appellant respectfully asserts, based on the arguments provided *supra*, that claim 30 is non-obvious. Accordingly, Appellant respectfully contends that the obviousness rejection of claim 30 is improper and should be overturned.

GROUND'S OF REJECTION 9

Claim 36 stands rejected under 35 U.S.C. 103(a) as allegedly being unpatentable over Fischer,
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Robertelli, Carr and Blaustein as applied to claim 34 above and further in view of Boland et al. (USPN 6253404).

Appellant further draws the Board's attention to the Examiner's modification of the secondary and tertiary references using Boland. If an independent claim, such as Claim 1, is non-obvious under 35 U.S.C. 103, then any claim depending therefrom is also non-obvious. *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988). Appellant respectfully asserts, based on the arguments provided *supra*, that claim 36 is non-obvious. Accordingly, Appellant respectfully contends that the obviousness rejection of claim 36 is improper and should be overturned.

GROUND OF REJECTION 10

Claim 37 stands rejected under 35 U.S.C. 103(a) as allegedly being unpatentable over Fischer, Robertelli, Carr, Blaustein and Boland as applied to claim 36 above.

The Examiner lacks substantial evidence in that no graphic or grip pattern is shown in the prior art. Appellant reasserts the same as improper as discussed in the grounds of rejection 1 above.

Further, the Examiner is improperly using the Yamada reference when Yamada is not even being used in the basis for the rejection.

If an independent claim, such as Claim 1, is non-obvious under 35 U.S.C. 103, then any claim depending therefrom is also non-obvious. *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988). Appellant respectfully asserts, based on the arguments provided *supra*, that claim 37 is non-obvious. Accordingly, Appellant respectfully contends that the obviousness rejection of claim 37 is improper and should be overturned.

GROUND OF REJECTION 11

Claims 39-40, 42-44 stand rejected under 35 U.S.C. 103(a) as allegedly being unpatentable over Fischer, Boland, Carr, Drulias and Blaustein.

Appellant reasserts the arguments made with respect to claims 1-6, 12, 16, 28, and 31-32 above. In addition, the Examiner's Answer asserts that because the cleaning tips in Boland progress from smaller to larger, that they could be used for children of all ages (page 17). The Examiner's Answer states further that the age the children use the cleaning tips is intended use; therefore the intended use of the claimed invention must result in a structural difference between the claimed invention and the prior art (page 17). However, as noted in the Appeal Brief, the Federal Court in *In re Zletz* held that "when an applicant states the meaning that claim terms are intended to have, the claims should be examined with that meaning, in order to achieve a complete exploration of the applicant's invention and its relation to the prior art." *In re Zletz*, 893 F.2d 319, 321, 13 USPQ2d 1320, 1322 (Fed. Cir. 1989). The Federal Court held further that the claims should be defined according to the specification. *In re Zletz*, 13 USPQ2d 1320, 1322. Here, the Appellant clearly differentiates a handle and cleaning tips from the cited art both in its form and function based on its size and specific use. Accordingly, the cleaning tips should be examined as cleaning tips to be used for children ages 1-4, respectively. Therefore, the cleaning tips in Boland do not meet the limitation of Claim 39 because none of the cleaning tips in Boland were dimensioned for children ages 0-4.

The Examiner's Answer again argues that it would have been obvious to interchange the tools from Fischer's kit with the tools in Boland and Carr in view of Drulias (page 18). Appellant respectfully contends that because it is not obvious to choose a foam material as taught in Drulias, then combining that reference with Fischer does not render Claim 39 obvious.

Because Claim 39 is not obvious in light of Boland, Carr, and Drulias, the combination of those prior art references to Fischer would be negligible, and lead to a conclusion of non-obviousness.

Appellant respectfully asserts, based on the arguments provided *supra*, that claims 40, 42-44 are non-obvious. Accordingly, Appellant respectfully contends that the obviousness rejection of claims 40, 42-44 are improper and should be overturned.

GROUND OF REJECTION 12

Claims 39-43 stand rejected under 35 U.S.C. 103(a) as allegedly being unpatentable over Fischer, Robertelli, Carr, Drulias and Blaustein.

The Examiner's Answer provides no new arguments except for substituting Boland for Robertelli. Based upon arguments provided *supra*, Claim 39 is NOT obvious in light of the arguments above and the cleaning tip in Robertelli, the cleaning end portions in Carr, or the universal handle in Blaustein.

If an independent claim, such as Claim 39, is non-obvious under 35 U.S.C. 103, then any claim depending therefrom is also non-obvious. *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988). Appellant respectfully asserts, based on the arguments provided *supra*, that claims 40-43 are non-obvious. Accordingly, Appellant respectfully contends that the obviousness rejections of claims 40-43 are improper and should be overturned.

GROUND OF REJECTION 13

Claims 45-46 stand rejected under 35 U.S.C. 103(a) as allegedly being unpatentable over Fischer, Boland, Carr, Drulias and Blaustein as applied to claim 44 above and further in view of Hammond (PGPub 20020008047) or Fischer, Robertelli, Carr, Drulias and Blaustein as applied to claim 44 above and further in view of Hammond (PGPub 20020008047).

If an independent claim, such as Claim 39, is non-obvious under 35 U.S.C. 103, then

any claim depending therefrom is also non-obvious. *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988). Appellant respectfully asserts, based on the arguments provided *supra*, that claims 45-46 are non-obvious. Accordingly, Appellant respectfully contends that the obviousness rejections of claims 45-46 are improper and should be overturned.

SUMMARY

In summary, Appellant respectfully requests reversal of the October 19, 2007 Office Action rejection of claims 1 – 10, 12-13, 16, 21-28, 30-37, 39-46.

Respectfully submitted,

Date: May 27, 2008

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